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No. 40

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

CHRYSLER CORPORATION, DESOTO MOTOR CORPORATION, PLYMOUTH MOTOR CORPORATION, DODGE BROTHERS CORPORATION, AND CHRYSLER SALES CORPORATION,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

PETITION OF THE APPELLANTS FOR REHEARING AND FOR STAY OF ISSUANCE OF MANDATE.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

NICHOLAS KELLEY,
WILLIAM STANLEY,
CARL MCFARLAND,
Counsel for Appellants.

LARKIN, RATHBONE & PERRY,
CUMMINGS & STANLEY,
Of Counsel.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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1 Freeman on Judgments (5th ed.), sec. 330, p. 661 11

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THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

PETITION OF THE APPELLANTS FOR REHEARING AND FOR STAY OF ISSUANCE OF MANDATE.

Come now the above-named appellants, Chrysler Corporation, DeSoto Motor Corporation, Plymouth Motor Corporation, Dodge Brothers Corporation, and Chrysler Sales Corporation, and present this, their petition for a rehearing of the above entitled cause and for an order staying issuance of the mandate of this Court. In support thereof appellants respectfully show:

Statement.

This is an appeal from a final decree of the District Court of the United States for the Northern District of

Indiana (R. 117-118), made December 21, 1940, modifying a final decree of the same court theretofore entered with the consent of the parties in November, 1938, in a suit in equity instituted by the United States under the Sherman Antitrust Act (R. 29-53). Appeal was allowed by the district judge for the Northern District of Indiana on February 14, 1941 (R. 121) and probable jurisdiction was noted by this Court on April 14, 1941, under the provisions of the Expediting Act, February 11, 1903, c. 544, sec. 2, 32 Stat. 823, as amended, 15 U. S. C. sec. 29, and section 238 of the Judicial Code, as amended, 28 U. S. C. sec. 345. Briefs were submitted and the case was argued October 24, 1941. A companion case, *Commercial Credit Co. et al.* v. *United States,* No. 41, was submitted on briefs. On December 8, 1941, this Court announced its decision as follows:

> Per Curiam: The Court orders that the appeals in these cases be dismissed for want of a quorum of Justices qualified to sit in them. The Chief Justice, Mr. Justice Roberts, Mr. Justice Murphy and Mr. Justice Jackson are unable to take part in the consideration or decision of these cases on the merits.

Effect of Dismissal Upon Appellants.—The result of the order of this Court is to deprive appellants of their statutory right of appeal and to leave in effect a decision of the District Court for the Northern District of Indiana that we believe is manifestly erroneous.

The modified decree from which appeal was taken prohibited appellants from owning, controlling or having an interest in a finance company after January 1, 1942, unless the Government, prior to that date, shall have obtained a final decree not subject to further review "requiring Gen-

eral Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation, and of all interest therein" (R. 46). There was and is no possibility of the Government securing such a decree before January 1, 1942. Therefore, when this Court dismissed the appeal the injury to appellants appeared to be only the continuing of the restraint imposed by section 12 of the decree until January 1, 1942. To appellants it seems fair to assume that the Court in dismissing the appeal because of the disqualification of the four Justices did so having in mind that the restraint on appellants would expire January 1, 1942.

Proceedings Subsequent to Entry of Order of Dismissal of Appeal by this Court.—The subsequent action of the Government and further order of the court below completely changed this aspect of the case in this Court. On December 15, 1941, one week after the dismissal of this appeal, the Government filed in the United States District Court for the Northern District of Indiana a new motion, a "Motion For Modification of the Final Decree and of the Final Decree as Modified". This new motion prays that the restraint contained in Section 12 of the decree be extended for an additional year to January 1, 1943, *i. e.*, that the restriction to which appellants gave their consent be extended without their consent and over their objection for a total of two years. A copy of the Government's motion appears in the accompanying Appendix, *infra*, p. 19.

In this new motion the Government without alleging any changed conditions of fact or of law is simply seeking a redrafting of the consent decree. This amply appears from the fact that after acknowledging the precise and specific terms of the first and second paragraphs of Sec-

tion 12 of the consent decree, the Government nevertheless alleges in the fifth paragraph of its motion:

> The primary purpose of the provisions of the decree relating to affiliation was to have the right of the plaintiff to prohibit affiliation between an automobile manufacturer and a finance company, under the circumstances set forth in the complaint upon which the consent decree is based, determined by the outcome of proceedings by the plaintiff to terminate the existing affiliation between General Motors Corporation and General Motors Acceptance Corporation. A subsidiary purpose was to protect respondents against undue delay by the plaintiff in prosecuting such proceedings by providing a specified date for bringing them to a conclusion. Circumstances arising since entry of the decree, not attributable to undue delay or laches by the plaintiff, have prevented bringing these proceedings to a conclusion by the date specified in paragraph 12, or by the date specified in paragraph 12 as modified by order of this Court. The essential purposes of the decree would be defeated if, under these circumstances, the prohibition against affiliation were allowed to lapse prior to final determination of the plaintiff's proceeding to end the affiliation between General Motors Corporation and General Motors Acceptance Corporation.

This excerpt states the substance of the motion so far as it may be regarded as advancing any ground for the relief prayed.

The final sentence of the quoted paragraph is important because it clearly displays the intention of the Government to cause the court below effectually to rewrite the consent decree of the parties in a manner which in substance will result in (a) the striking from the consent decree, and the rendering nugatory, of all provisions of the second paragraph of Section 12, and (b) presumably, in lieu thereof, the inclusion of Section 12 among the subsections which

are enumerated in Section 12a(3)i. All this under the pretext of accomplishing an asserted primary purpose and subsidiary purpose neither of which appear from, and both of which are contradicted by, the plain terms of the contract between the parties ratified by the court as a consent decree.

The appellant Chrysler Corporation together with its co-appellant subsidiaries (hereinafter, for brevity, referred to as Chrysler) filed an answer setting up as defenses: (1) Lack of jurisdiction in the trial court to proceed in the cause while the appeal was still pending in this Court, mandate not yet having been issued; (2) Demurrer—that the motion failed to state a claim upon which relief can be granted; and (3) Denial of substantially all allegations upon which the motion was based (App'x, p. 24).

At the argument on December 22, 1941, the trial court overruled the first two defenses. The Government then offered in evidence certified copies of the pleadings, motions and orders entered in its civil suit against General Motors Corporation and General Motors Acceptance Corporation.

Thereupon the court entered its order as follows:

> This matter came on to be heard by the Court on motion of the United States for modification of the modified final decree and the Court having heard argument of counsel and the Government having introduced its evidence and the defendants having requested a continuance in order to produce further evidence——
>
> It is ORDERED that the hearing be and the same is hereby continued until the 16th day of February 1942.
>
> It is further ORDERED that pending the final disposition of the Government's motion the provisions of the decree enjoining Chrysler Corporation from acquiring an interest in a finance company shall remain in full force and effect notwithstanding Paragraph 12 of said decree.

All of this is NOW ORDERED, ADJUDGED and DECREED this 22nd day of December, 1941.

Defendants granted exception.

THOMAS W. SLICK,
Judge of the United States District Court for the Northern District of Indiana.

Reasons for Granting Petition for Rehearing.

1. *The question on the merits is one of general importance.*—There is presented the important question whether, after entry of a consent decree, the Government, without allegation or proof of changed conditions or unlawfulness under the Sherman Act, may properly impose upon the defendants additional restrictions plainly repugnant to the terms of the agreement approved by the parties and the court and embodied in the consent decree.

2. *Dismissal of the appeal will deprive appellants of their statutory right of review.*—By statute appellants are given the right of appeal to this Court including a decision by this Court of the questions properly presented on such appeal. This Court has recognized that by the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. sec. 29 and Section 238 of the Judicial Code, as amended, 28 U. S. C. sec. 345, Congress sought to ensure speedy disposition of suits in equity by the United States under the Anti-Trust Act. *United States* v. *California Canneries,* 279 U. S. 553, 558. But by the same Act the Congress took all appellate jurisdiction of such suits from the Circuit Courts of Appeals. *Swift & Co.* v. *United States,* 276 U. S. 311, 323. As a result of the dismissal of their appeal, appellants not only have been denied review in this Court but have been effectually prevented from obtaining any judicial review of the order of the trial judge that is—as we believe amply appears from the briefs filed in this Court—in conflict with the prior decisions of this Court

and repugnant as well to the elementary principles of due process.

3. *The general rule of disqualification of judges for interest must here yield to the exception which is equally well-established and recognizes the necessity of preserving appellants' statutory right of appeal.*—In causing the dismissal of this appeal it may be that the recusant Justices have overlooked the fact that to the general rule based on the principle that no man should judge his own case there is an equally established exception. Under this exception it is settled that a judge deeming himself otherwise disqualified nevertheless owes to the litigant a higher duty to preserve the statutory right to adjudication and must therefore participate in the consideration and decision of a case when such participation is essential to the exercise of the jurisdiction of the only tribunal in which that statutory right may be secured.

In *Evans* v. *Gore*, 253 U. S. 245 (involving the constitutionality of federal income taxes on the salaries of the federal judiciary) this Court, speaking through Mr. Justice Van Devanter, said (pp. 247-248):

> Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the Government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only

course open to us is to consider and decide the cause.—a conclusion supported by precedents reaching back many years.

In *Miles* v. *Graham,* 268 U. S. 501, all nine of the Justices participated although the pecuniary interests of five in the tax on their respective salaries were directly affected. And in *O'Malley* v. *Woodrough,* 307 U. S. 277, the taxability of the salaries of four of the participating Justices was directly involved. All except Mr. Justice McReynolds took part in the consideration and decision of the case. In *Tumey* v. *Ohio,* 273 U. S. 510, after recognizing the general rule that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in a controversy, the Court said (p. 522):

> Then the circumstance that there is no judge not equally disqualified to act in such a case has been held to affect the question. *Wheeling* v. *Black,* 25 W. Va. 266, 280; *Peck* v. *Freeholders of Essex,* 20 N. J. L. 457; *Dimes* v. *Grand Junction Canal,* 3 H. L. C. 759 (see Baron Parke's Answer for the Judges, pp. 785, 787); Year Book, 8 Henry 6, 19, s. c. 2 Roll. Abridg. 93; *Evans* v. *Gore,* 253 U. S. 245, 247; *Stuart* v. *Mechanics' & Farmers' Bank,* 19 Johns. 496; *Ranger* v. *Railroad,* 5 H. L. C. 72.

As the opinion in *Evans* v. *Gore, supra,* indicates, the precedents are numerous.

In *Philadelphia* v. *Fox,* 64 Pa. 170, the court held (p. 185):

> The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be. The rights of the other party require it: 2 Roll. Ab. 93; Dimes *v.* Grand Junction Railroad, 3 House of Lords Cases 759.

In *State ex rel. Null* v. *Polley,* 34 So. Dak. 565, the defendant secretary of state filed objections to further proceedings on a petition for a writ of prohibition to prevent him from

certifying nominations preliminary to an election. His ground was that three of the five justices were directly interested in that their current terms of office might be extended as a result of their decision. In overruling this contention the court said (p. 569):

> If three of the judges of this court are disqualified, the remaining two are powerless to pronounce a decision upon the rights of the parties in this case. Neither the Constitution nor any law of this state provides for the calling in a judge of another court or member of the bar to act in the place of a disqualified member of this court. A clearer case of absolute necessity on the part of the judges to act could hardly be conceived. Under any other rule, the parties to this controversy would be without a forum in which their respective rights could be determined.

Referring to its decision on the merits refusing the writ, the court said (p. 570):

> But, even if our conclusion had been the reverse, the rule of necessity would have been the same, and we should have felt compelled to disregard the objections and render a decision. Had we declined to act in such case, plaintiff would have been without a remedy, and defendant, whether his proposed acts were legal or illegal, would be out of reach of the law, and would be a law unto himself. In such cases the rule of disqualification of judges is deemed of less importance than the denial of the constitutional right to a forum in which rights may be adjudicated. And, however, embarrassing the situation may be to us, we are unanimously of opinion that this court should not abdicate its functions and duties in any case, where such action would, in effect, deprive the citizen of his constitutional rights.

The opinion of the same court in *McCoy* v. *Handlin*, 35 S. D. 487, 502-506, is valuable for its extended consideration of the 'authorities.

In *In the Matter of Leefe,* 2 Barb. Ch. 39, the chancellor, because the defendant was his brother, had earlier referred the matter to the vice chancellor of the first circuit who entered a decree affecting the defendant in his official character only. The defendant appealed. Chancellor Walworth said:

> As the constitution gives to parties an appeal to the chancellor from all inferior equity tribunals, and the legislature has made no provision authorizing any other person to sit for him, in a case where that officer is related to one of the parties, the chancellor is bound to hear the appeal, even where a near relative is personally interested. This was done by Chancellor Kent; who took jurisdiction of, and heard, a litigated cause in which his brother was one of the parties, and personally interested. He also heard and decided the case of *Mooers v. White,* (6 *John. Ch. R.* 360) where his brother-in-law was the complainant; the legislature not having authorized any other person to sit for the chancellor in such a case. The statute, it is true, prohibits any judge from sitting, where he is related to either of the parties within the ninth degree, of affinity or consanguinity; but it has not provided for any other person, or tribunal, to exercise the appellate power which is given to the chancellor, by the constitution, in such cases. The constitution must, therefore, control; as that is the paramount law.

The exception based on necessity has also been invoked in *Brinkley* v. *Hassig,* 83 F. 2d 351, 357; *Georgia C. Telephone Co.* v. *Georgia Pub. Serv. Com'n,* 8 F. Supp. 434, 436; *State ex rel. Cook* v. *Houser,* 122 Wis. 534, 539; *State ex rel. Wickham* v. *Nygaard,* 159 Wis. 396, 398, 400; *State ex rel.* v. *Humphreys,* 163 Tenn. 20, 22-23; *Moulton* v. *Byrd,* 224 Ala. 403, 405; *Galey* v. *Board of Commissioners,* 174 Ind. 181, 184; *Gordy* v. *Dennis,* 176 Md. 106, 108-110; *Long* v. *Watts,* 183 N. C. 99, 102; *Dimes* v. *Grand Junction Canal,* 3 H. L. C. 759, 787, 788, 10 Eng. Repr. R. 301, 313; see *Mon-*

tana Power Co. v. *Public Service Commission,* 12 F. Supp. 946, 949; *Bliss* v. *Caille Brothers Co.,* 149 Mich. 601, 609-610; *Pearce* v. *Atwood,* 13 Mass. 324, 340; *Metsker* v. *Whitsell,* 181 Ind. 126, 137-138; *Stafford* v. *County Court,* 58 W. Va. 88, 93; *Price* v. *Fitzpatrick,* 85 W. Va. 76, 78-80; *Ison* v. *Western Vegetable Distributors,* 48 Ariz. 104, 118; *Oakley* v. *Aspinwall,* 3 N. Y. 547, 555; *Ten Eick* v. *Simpson,* 11 Paige 177, 179; *Paddock* v. *Wells,* 2 Barb. Ch. 331, 335; *The People* v. *Edmonds,* 15 Barb. 529, 530-531; *Between the Parishes of Great Charte and Kennington,* 2 Strange 1173, 1174, 93 Eng. Repr. R. 1107; *The Mayor of London* v. *Markwick,* 11 Mod. 164; 1 Freeman on Judgments (5th ed.) sec. 330, p. 661.

It is submitted that on the authorities and on principle the necessity of a quorum to preserve appellants' statutory right of appeal requires and justifies the participation in the consideration of this case of Justices who might otherwise deem themselves disqualified to sit.

4. *The appeal continues to present an actual and pending controversy between adverse interests and the case is not moot.*—As clearly appears from the provisions of the order of the trial court entered December 22, 1941, *supra,* p. 5, the restraint of the injunctive decree brought here by appellants' appeal has now been extended until final disposition by the trial court of the Government's new motion and until at least as late as February 16, 1942. It thus is apparent that the restraint imposed by the modified decree from which appellants took their appeal is now in continuing full force and effect and the case will not become moot as of January 1, 1942.

To the end that the record in this Court may show that the case is not moot the appellants are filing herewith their Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari, *infra,* p. 15.

The Government's "Motion for Modification of the Final Decree and of the Final Decree as Modified" filed December 15, 1941, in the District Court seeks the same relief as that which is in question on the appeal dismissed by this Court. Because it demands that the restriction against appellants be extended for an additional year and adduces no new ground therefor, the questions to be decided in the final disposition of this new motion of the Government will be the same as those here and now presented. Thus, unless rehearing be granted and this appeal be determined, appellants will be put to the expense and delay incident to relitigation in the trial court and appeal to this Court to raise exactly the same question. At the same time, appellants, though subjected to such expense and delay, must so proceed with no certainty that they will not again be met with a dismissal of their appeal on the ground that there is not a quorum of Justices who deem themselves qualified to sit.

On the other hand, if a quorum may now be obtained to decide this case, it is apparent that the determination of the questions presented will control in the disposition of the Government's new motion in the trial court and in large degree minimize, if indeed it does not entirely resolve, the issues there presented.

Reason for Allowance of Order Staying Issuance of Mandate.

It is apparent that protection of the rights of appellants requires that the mandate be withheld pending final disposition of the cause in this Court. If this Court shall grant the accompanying motion for certiorari requiring certification

to this Court of all motions, papers and orders filed in the trial court subsequent to the entry of the Court's order dismissing the appeal entered December 8, 1941, this Court will have before it the entire record enabling it to make disposition of all issues in the case.

In this connection it is important to note that the trial court has gone beyond merely keeping the case in *status quo* and has assumed, over objection, to exercise general jurisdiction while the appeal of the case is still pending in this Court.

The trial court, of course, had power to enter such orders as it might, in its discretion, deem necessary to preserve the *status quo*. But the order entered December 22, 1941, was plainly not so limited. It is, therefore, in conflict with the established rule, essential to orderly procedure, that an appeal suspends the power of the court below to proceed further in the cause (*Hovey* v. *McDonald*, 109 U. S. 150, 156-157; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 177; *United States* v. *Radice*, 40 F. (2d) 445, 446; *The Midland Terminal Ry. Co.* v. *Warinner*, 294 Fed. 185, 189) and that an appeal must be regarded as pending and undisposed of in this Court until the mandate issues. *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527, 536.

It is submitted that on the facts of this case stay of the issuance of mandate is appropriate as an aid to preservation of the appellate jurisdiction of this Court, protection of the rights of appellants and the orderly disposition of the case.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that issuance of the mandate of this Court be stayed until final disposition

of the cause and that the decree of the United States District Court for the Northern District of Indiana be, upon further consideration, reversed.

Respectfully submitted,

NICHOLAS KELLEY,
WILLIAM STANLEY,
CARL MCFARLAND,
Counsel for Appellants.

LARKIN, RATHBONE & PERRY,
CUMMINGS & STANLEY,
Of Counsel.

December, 1941.

I, William Stanley, counsel for the above-named appellants, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM STANLEY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 40

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Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

May It Please the Court:

The appellants suggest that there is a diminution of the record in the above-entitled cause and respectfully move that this Honorable Court issue its writ of certiorari directed to the District Court of the United States for the

District Court for the Northern District of Indiana dated December 22, 1941.

NICHOLAS KELLEY,
WILLIAM STANLEY,
CARL MCFARLAND,
Counsel for Appellants.

LARKIN, RATHBONE & PERRY,
CUMMINGS & STANLEY,
Of Counsel.

I, William Stanley, counsel for the appellants in the above-entitled cause, do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari" are true.

WILLIAM STANLEY.

Subscribed and sworn to before me this 31st day of December, 1941.

RUTH M. KELM,
Notary Public, D. C.

[SEAL.]

My Commission Expires December 2, 1945.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

Civil No. 9.

UNITED STATES OF AMERICA, Complainant,

vs.

CHRYSLER CORPORATION, et al., Defendants.

MOTION FOR MODIFICATION OF THE FINAL DECREE AND OF THE FINAL DECREE AS MODIFIED—Filed December 15, 1941.

The United States of America, plaintiff in the above entitled action, by Alexander M. Campbell, United States Attorney for the Northern District of Indiana, and Edmond J. Ford, Special Assistant to the Atttorney General of the United States, both acting under the direction of the Attorney General, represent and move as follows:

On November 15, 1938, a final decree was entered by consent in this case. The first paragraph of paragraph 12 of this decree enjoined the respondent manufacturer from making loans to, and, subject to certain limitations, from purchasing the securities of, the respondent finance company or any other finance company. The second paragraph of paragraph 12 provided that if an effective final order or decree should not have been entered by January 1, 1941, requiring General Motors Corporation to divest itself of all ownership and control of General Motors Acceptance Corporation, then nothing in the decree should preclude the manufacturer from acquiring and retaining ownership of, control over, or an interest in, any finance company.

On December 21, 1940, this Court, after a hearing, entered an order modifying the second paragraph of paragraph 12 by changing the date therein set forth with respect to entry of an effective final order or decree against General Motors Corporation, from January 1, 1941, to January 1, 1942.

The consent decree contains numerous provisions the effect of which is that, while the various prohibitions of the decree are to be presently effective, their ultimately binding effect is to be dependent upon the outcome of certain proceedings by the plaintiff under the antitrust laws against General Motors Corporation and its subsidiary finance company, General Motors Acceptance Corporation. The consent decree was entered without submitting the issues raised by the proceeding against respondents to the test of litigation. The decree provides, in substance, that the plaintiff's litigation against General Motors Corporation shall be substituted for such test and that the prohibitions of the decree shall later be adjusted to accord with the adjudications made and the results achieved in the proceedings against General Motors Corporation.

The primary purpose of the provisions of the decree relating to affiliation was to have the right of the plaintiff to prohibit affiliation between an automobile manufacturer and a finance company, under the circumstances set forth in the complaint upon which the consent decree is based, determined by the outcome of proceedings by the plaintiff to terminate the existing affiliation between General Motors Corporation and General Motors Acceptance Corporation. A subsidiary purpose was to protect respondents against undue delay by the plaintiff in prosecuting such proceedings by providing a specified date for bringing them to a conclusion. Circumstances arising since entry of the decree, not attributable to undue delay or laches by the plaintiff, have prevented bringing these proceedings to a conclusion by the date specified in paragraph 12, or by the date specified in paragraph 12 as modified by order of this Court. The essential purposes of the decree would be defeated if, under these circumstances, the prohibition against affiliation were allowed to lapse prior to final determination of the plaintiff's proceeding to end the affiliation between General Motors Corporation and General Motors Acceptance Corporation.

The plaintiff represents that it has proceeded with due diligence to procure a decree requiring General Motors Corporation to divest itself of ownership and control of

General Motors Acceptance Corporation; that the entry of such a decree is dependent upon proving certain involved facts and establishing numerous disputed principles of law; that the issues involved in a proceeding to obtain such a decree have been to a great extent involved in a criminal proceeding instituted in this Court by an indictment returned on May 27, 1938, to wit, *United States of America* v. *General Motors Corporation,* Criminal Case No. 1039; that the issues in such civil proceeding would be substantially affected and settled by the final disposition of said criminal proceeding; that after numerous preliminary pleas, motions and hearings and a long jury trial verdicts of guilty were returned against General Motors Corporation and General Motors Acceptance Corporation and judgments of conviction were entered against them on November 17, 1939; that after an appeal by the convicted defendants to the Circuit Court of Appeals for the Seventh Circuit that court on May 1, 1941, affirmed the convictions and subsequently denied a petition for rehearing; that the defendants thereupon filed a petition for a writ of certiorari in the Supreme Court of the United States; that the Supreme Court denied said petition on October 13, 1941, and denied a petition for rehearing on November 10, 1941.

The plaintiff on October 4, 1940, filed a proceeding (Civil Action No. 2177) in the District Court of the United States for the Northern District of Illinois, Eastern Division, against General Motors Corporation and General Motors Acceptance Corporation to compel General Motors Corporation to divest itself of all ownership and control of General Motors Acceptance Corporation; that many important issues in this civil action will be rendered *res adjudicata* by the final determination of the criminal proceeding against the same defendants; that such final determination will simplify and shorten the trial in the civil suit; that to have proceeded with the trial of the civil suit before the criminal action was finally disposed of would have greatly lengthened the time of trial, would have involved great additional and unnecessary expense to all parties, and would have resulted in a needless retrial of many of the same issues of law and fact.

The plaintiff further represents that it has attempted to expedite the trial of the civil case against General Motors now pending in the Northern District of Illinois, Eastern Division, but that the court in that District on July 15, 1941, upon motion of the defendants and over the objection of the Government, granted a continuance to the defendants to run until further order of the court. This motion was granted primarily because the court was of the opinion that final adjudication of the criminal case against General Motors Corporation would greatly simplify trial of the civil proceeding. On December 2, 1941, the Government presented a motion asking the court to set an early date for the filing of all preliminary pleadings and motions and a date for disposing of the same, so that the case would be ready for trial on the issues. The defendants at the same time filed a motion for further delay and the court, after a hearing, continued the case until January 15, 1942, and held in abeyance the Government's motion.

By paragraph 14 of the consent decree in this case, this Court retained jurisdiction of the cause for the purpose of enabling any party to apply to the court at any time for modification of the decree and, aside from this provision, the Court inherently has the right to modify a decree, whether entered by consent or otherwise, as the ends of justice may require.

The plaintiff avers that it will prosecute with diligence the proceeding against General Motors Corporation now pending in the Northern District of Illinois but that the cause cannot be brought to a final conclusion by January 1, 1942.

The plaintiff therefore moves that the second paragraph of paragraph 12 of the consent decree in this case, as modified by this Court, be again modified in such manner that the words of said paragraph, to wit, "on or before January 1, 1942", be modified to read "on or before January 1, 1943", with the result that said decree shall be so modified that the second paragraph of paragraph 12 shall read as follows:

> It is an express condition of this decree that notwithstanding the provision of the preceding paragraph of

this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1943, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then, and in that event, nothing in this decree shall preclude the manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

ALEXANDER M. CAMPBELL,
United States Attorney for the Northern District of Indiana;
EDMOND J. FORD,
Special Assistant to the Attorney General,
Attorneys for the Plaintiff.

AFFIDAVIT IN SUPPORT OF MOTION FOR MODIFICATION OF FINAL DECREE.

I, Edmond J. Ford, being duly sworn, do hereby make oath and depose as follows:

I have read the attached Motion for Modification of the Final Decree and of the Final Decree as Modified in the above entitled case and am familiar with the facts therein set forth and the circumstances under which the aforesaid motion is filed. I hereby make oath that the statements therein set forth are true. The sources of my information are original documents and facts learned in my handling

of the matters referred to in the aforesaid motion as Special Assistant to the Attorney General of the United States.

(Signed) EDMOND J. FORD,
Special Assistant to the Attorney General.

UNITED STATES OF AMERICA,
District of Columbia, ss:

December 11, 1940.

Personally appeared before me, Edmond J. Ford, to me known, and signed the aforegoing affidavit in my presence, and being duly sworn did make oath to the truth of the statement aforesaid signed by him.

(Signed) DOROTHY J. HEALE,
Notary Public.

My Commission Expires October 2, 1944.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASWER OF CHRYSLER CORPORATION, DESOTO MOTORS CORPORATION, PLYMOUTH MOTOR CORPORATION, DODGE BROTHERS CORPORATION AND CHRYSLER SALES CORPORATION TO MOTION FOR MODIFICATION OF THE FINAL DECREE AND OF THE FINAL DECREE AS MODIFIED—Filed December 22, 1941.

The defendants Chrysler Corporation, DeSoto Motors Corporation, Plymouth Motor Corporation, Dodge Brothers Corporation and Chrysler Sales Corporation, by S. J. Crumpacker and Larkin, Rathbone & Perry, their attorneys, answer the Motion for Modification of the Final Decree and of the Final Decree as Modified, as follows:

I.

1. The plaintiff fails to state in its motion a claim against these defendants upon which the relief it seeks can be granted.

II.

2. This Court is without jurisdiction to grant the plaintiff's Motion for Modification of the Final Decree and of the Final Decree as Modified. Upon perfection of the appeal from the Decree of this Court, as modified by its Order of December 21, 1940, all jurisdiction of this cause was transferred to the Supreme Court of the United States. Until

mandate issues from the Supreme Court of the United States, the appeal is there pending and this Court is without power to modify the decree which is before the Supreme Court.

III.

3. Defendants admit that on November 15, 1938, this Court entered a Final Decree upon the consent of the parties, without any testimony having been taken and without any findings of fact, but they deny that the contents or purpose or effect of the Final Decree are as stated in the motion, and they respectfully beg leave to refer to the original Final Decree for the exact contents and purpose and effect thereof.

4. Defendants admit that on December 21, 1940, this Court entered an Order entitled Order of Modification of Final Decree, purporting to change the date appearing in the second paragraph of Section 12 of said Final Decree from "January 1, 1941" to "January 1, 1942", and they respectfully beg leave to refer to the original Order for the exact contents thereof. Defendants allege that they appealed from that Order to the United States Supreme Court, that on December 8, 1941, that Court entered the following Order:

"*Per curiam:* The Court orders that the appeals in these cases be dismissed for want of a quorum of Justices qualified to sit in them. The Chief Justice, Mr. Justice Roberts, Mr. Justice Murphy and Mr. Justice Jackson are unable to take part in the consideration or decision of these cases on the merits."

and that Defendants will duly apply for a rehearing of that appeal.

5. Defendants deny that circumstances arising since entry of the Final Decree, not attributable to undue delay or laches by the plaintiff, have prevented the plaintiff's bringing proceedings against General Motors Corporation to a conclusion by the date specified in Section 12 of the Final Decree or by the date specified in Section 12 of the Final Decree as Modified; deny that the essential purpose, or any purpose, of the Final Decree would be defeated if the prohibitions against affiliation were allowed to lapse prior

to final determination of the plaintiff's proceeding to end the affiliation between General Motors Corporation and General Motors Acceptance Corporation, and deny that plaintiff has proceeded with due diligence to procure a decree requiring General Motors Corporation to divest itself of ownership of or control over General Motors Acceptance Corporation. Defendants allege that said civil suit is not at issue, and that General Motors Corporation and General Motors Acceptance Corporation have until January 15, 1942, to file their answer or to make any motion with respect to the complaint, and that the plaintiff not only has failed and neglected to expedite trial of the civil suit, but has failed and neglected to proceed in that suit so as to dispose of practice motions and other preliminary matters and to frame the issues for trial.

6. Defendants deny that the issues involved in a proceeding to obtain a civil decree against General Motors Corporation have been to a great extent involved in Criminal Case No. 1039, or that the issues in the civil proceeding will be substantially affected and settled by final disposition of said criminal proceeding. On the contrary, defendants allege that the issues involved in the plaintiff's civil suit against General Motors Corporation, in so far as they concern the effectiveness of the second paragraph of Section 12 of the Final Decree, were not involved or settled in plaintiff's criminal case against General Motors Corporation except to the extent that the Court by its charge to the jury in that case ruled against the plaintiff on the issue of the propriety of General Motors Corporation having a finance company. In said case, Criminal Case No. 1039, the Court charged the jury on November 15, 1939, being more than a year prior to January 1, 1941, as follows:

"It is not unreasonable for the General Motors Company to have a finance company. * * * They have a perfect right to have a finance company and to recommend its use. * * *."

7. Defendants deny that for the plaintiff to have proceeded with the trial of the civil suit against General Motors Corporation before the criminal action was finally disposed of would have been undesirable and they allege that the

plaintiff, itself, represented to the District Court for the Northern District of Illinois, Eastern Division, in opposing continuances of the civil suit long before the criminal case was finally disposed of that it was desirable to proceed with both cases simultaneously. Defendants further allege that the plaintiff, by representing to this Court, in its Motion for Modification of Final Decree in this case in December, 1940, that trial of the civil suit against General Motors Corporation would be facilitated by trial first of the Criminal Case No. 1039, enabled General Motors Corporation to obtain continuances of the civil suit although plaintiff in that suit took with the Court in Illinois a position opposite to what it took with this Court in December, 1940, and opposite to what it takes with this Court now.

8. Defendants allege that before the parties consented to the Final Decree of November 15, 1938, they discussed at length the period during which defendants should be restrained from having an interest in a finance company while General Motors Corporation was not similarly restrained; that the possibilities of delay were canvassed in detail; that both parties gave their consent to the Final Decree with full knowledge, and that consent was not given or obtainable except on the basis of said date. Edmund J. Ford, upon whose affidavit the plaintiff's motion is made, was not present at the conferences or negotiations at which the parties determined the form of the Final Decree.

9. Defendants beg leave to refer to all of the records of the Court in this case, with the same force and effect as though the same were set forth at length herein.

Wherefore, these answering defendants respectfully pray:

(1) That said motion be dismissed forthwith; or

(2) That, if said motion be not dismissed, plaintiff be required to plead with particularity any changed basic conditions of fact or law upon which it relies; and that defendants, thereafter, be given sufficient notice and opportunity to prepare their response and defense; or

(3) That, if said motion be not dismissed and if plaintiff is not required to plead further, the motion now filed herein

be set down for hearing for the taking of proof on the merits, upon such terms and conditions as will assure defendants due notice of the issues and adequate opportunity to prepare its response or defense thereto.

There is filed herewith a brief memorandum of points and authorities in support hereof.

Dated: December 22, 1941.

PARKER CRABILL CRUMPACKER,
MAY CARLISLE & BEAMON,
S. J. CRUMPACKER,
LARKIN, RATHBONE & PERRY,
NICHOLAS KELLEY,
70 Broadway, New York, N. Y.,
Attorneys for Defendants Chrysler Corporation, DeSoto Motors Corporation, Plymouth Motor Corporation, Dodge Brothers Corporation and Chrysler Sales Corporation.

STATE OF INDIANA,
St. Joseph County, ss:

William Stanley, being duly sworn, says: That he is an attorney and was at the time of the negotiations and entry herein of the Final Decree one of the attorneys for the above-named defendants, Chrysler Corporation, DeSoto Motors Corporation, Plymouth Motor Corporation, Dodge Brothers Corporation and Chrysler Sales Corporation; that he was present at substantially all of the conferences and negotiations at which the parties agreed upon the form of the Final Decree entered herein on the consent of the parties; that he has read and knows the contents of the foregoing Answer to the Complainant's Motion for Modification of Final Decree and of the Final Decree as Modified therein; that said Answer is true of his own knowledge.

WILLIAM STANLEY.

Sworn to before me this 22nd day of December, 1941.
MARGARET LONG.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

Civil No. 9

UNITED STATES OF AMERICA, Complainant,

v.

CHRYSLER CORPORATION, et al., Defendants

ORDER—December 22, 1941

This matter came on to be heard by the Court on motion of the United States for modification of the modified final decree and the Court having heard argument of counsel and the Government having introduced its evidence and the defendants having requested a continuance in order to produce further evidence—

It is Ordered that the hearing be and the same is hereby continued until the 16th day of February 1942.

It is further Ordered that pending the final disposition of the Government's motion the provisions of the decree enjoining Chrysler Corporation from acquiring an interest in a finance company shall remain in full force and effect, notwithstanding Paragraph 12 of said decree.

All of this is now Ordered, Adjudged and Decreed this 22nd day of December, 1941. Defendants granted Exception.

THOS. W. SLICK,

Judge of the United States District Court for the Northern District of Indiana.

(8037)